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No. 84-1703

In The
Supreme Court of the United States
October Term, 1984

ANTHONY EHLENFELDT,

Petitioner,

v.

C.W. TRANSPORT, INC., LOCAL UNION NO. 710 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, WILLIAM CLOSE, THOMAS O'MALLEY, LEROY RANKIN, AND FRANK WSOL,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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STATEMENT OF THE CASE

The respondent, C. W. Transport, Inc., wishes to correct certain inaccuracies and omissions in the petitioner's Statement of the Case.

Petitioner, *Ehlenfeldt,* indicates that in October of 1981 he informed the Company he would retire upon completion of 20 years employment. According to Ehlenfeldt's deposition, he merely made an off-hand comment to a company management employee that he "thought" he'd make room for a younger employee. The matter was apparently not pursued any further and the person to whom the comment was made did not participate in Ehlenfeldt's discharge in any way.

Petitioner Ehlenfeldt also states that his union steward told him after the arbitration hearing that "he thought Ehlenfeldt did not have enough pension credits to be eligible for this particular plan." In fact, the union steward told him, in response to a question from Ehlenfeldt as to how to get his pension:

> " . . . just go to the hall and check your time, but I told him I didn't think he was old enough, but if he had enough time, he could possibly get it."
>
> "Q. You said you didn't think he was old enough?
>
> A. Yeah.
>
> Q. And by that you meant he didn't have enough years or credits to receive his pension?
>
> A. No, I didn't mean it that way. I meant there's a certain age that you can freeze your pension."

It is clear the union steward was referring to chronological age, not pension credits as petitioner would have us believe.

Petitioner states that he grieved his discharge on the grounds that the delay of freight was excusable because he had become ill from exhaust fumes entering the cab. In fact, the written grievance makes no reference to petitioner being ill or that exhaust fumes entered the cab. The illness issue was not raised until the arbitration hearing and petitioner made no notation of any such defective or unsafe condition on the dispatch ticket as he is required to do by company rule, union contract and regulations of the Department of Transportation. There is evidence that the illness issue was thought up after the fact.

Petitioner makes a serious misstatement of fact when he indicates that the union "advised Ehlenfeldt to execute a Waiver of Ten Day Notice. . . ." Neither Ehlenfeldt nor any other witness ever testified that the union advised him to execute the waiver. There is no evidence upon which to base such a statement. The union representative advised him as to the effect of the waiver. The chairman of the joint arbitration board advised him of the effect of the waiver and explained his options. It was petitioner who insisted that he was prepared and insisted on proceeding with the hearing.

Finally, petitioner states that the union permitted the company to introduce evidence at the hearing which should have been disallowed under the contract. The only evidence produced by the company at the hearing was the discharge letter (which is required) and a prior warning letter dated within the contractual 9 month period (also required). The petitioner's complaint arises from the fact that the discharge letter referred to unspecified

"numerous warning letters" some of which may have been more than 9 months old.

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SUMMARY OF ARGUMENT

The defendants-respondents, C.W. Transport, Inc., William Close and Thomas O'Malley argue:

1. That the standard of intentional misconduct applied by the Seventh Circuit Court of Appeals to determine whether a union has breached its duty of fair representation is mandated by decisions of this Court. Petitioner mistakenly construes the terms "arbitrary" and "perfunctory" as requiring something less than intentional conduct and therefore concludes that the standard applied by the Seventh Circuit is in conflict with *Vaca v. Sipes,* 386 U.S. 171, 17 L.Ed.2d 842, 87 S.Ct. 903 (1967). When *Vaca* is considered in light of previous and subsequent cases decided by this Court, the element of intentionality is established.

2. The decisions of the various Courts of Appeal (with the possible exception of the 9th Circuit) cited by petitioner are not actually in conflict with the Seventh Circuit standard. All those Circuits have held that negligent conduct alone is insufficient to breach the duty of fair representation. Terms and phrases such as "arbitrary", "capricious", "bad faith", "perfunctory", "without concern or solicitude" and "cursory" as used in the decisions of this Court and the Courts of Appeals do imply some form of intentional conduct. Therefore, the con-

flicts, if they are conflicts, are more in the nature of form and not substance.

3. The petitioner has alleged a bare theory of malicious discrimination by the company and the union. The courts below found that the record contained no evidence to support these bare allegations. In his petition for certiorari, Ehlenfeldt makes the same bare allegation to support his argument that the courts below erred in applying the standard to the facts.

4. There is therefore no reason to issue a Writ of Certiorari to the Seventh Circuit Court of Appeals.

ARGUMENT

I.

The Standard Of Intentional Misconduct Is In Harmony With Decisions Of This Court.

This Court held that for a union to meet the obligation imposed by the duty of fair representation it is required "to make an honest effort to serve the interests of all those members, *without hostility to any.*" *Ford Motor Company v. Huffman,* 345 U.S. 330 at 337, 97 L.Ed.1048, 73 S.C. 681 (1953) (Emphasis supplied).

The standard of union conduct was further explained when this Court refused to sustain, in a 301 suit, a finding that the union had acted improperly or breached its duty of fair representation because "there is no substantial evidence of fraud, deceitful action or dishonest conduct."

Humphrey v. Moore, 375 U.S. 335 at 348, 11 L.Ed.2d 370, 84 S.Ct. 363 (1964).

In this context, this Court decided *Vaca v. Sipes,* 386 U.S. 171, 17 L.Ed.2d 842, 87 S.Ct. 903 (1967) where it was held:

> "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Id.* at 190.

Some courts and commentators believe that the "arbitrary" standard announced in *Vaca* requires something less than intentional conduct, that some form of negligent conduct will suffice.

This Court decided that issue in *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America v. Lockridge,* 403 U.S. 274, 29 L.Ed.2d 473, 91 S.Ct. 1909 (1971), *reh denied,* 404 U.S. 874, 30 L.Ed. 2d 120, 92 S.Ct. 24 (1971), when it held that in order to establish a breach of the duty of fair representation a plaintiff must prove arbitrary or bad faith conduct on the part of the union (the *Vaca* standard) and that "There must be 'substantial evidence of fraud, deceitful action or dishonest conduct!'" *Id.* at 299 (the *Humphrey* standard). The Court further indicated that the doctrine of fair representation was originally developed and applied by the courts "and carries with it the need to adduce substantial evidence of discrimination that is *intentional,* severe, and unrelated to legitimate union objectives. . . ." *Id.* at 301. (Emphasis supplied)

We believe that the standard of intentional misconduct adopted by the Seventh Circuit Court of Appeals is,

contrary to petitioner's claim, in harmony with the decisions of this Court.

II.

The Alleged Conflict Between The Circuits Is One Of Form, Not Substance.

Petitioner cites *Griffin v. Intl. Union, United Auto Workers,* 469 F.2d 181 (4th Cir., 1972) as showing that the Fourth Circuit has rejected a standard of intentional conduct. That case merely applied the *Vaca* standard of arbitrary or bad faith conduct. The facts of the case clearly showed that there was substantial evidence of bad faith because union officers, who were close friends of the Operations Manager who had been assaulted by the grievant, conspired to have the grievant's case against the Operations Manager dropped. References to "arbritary" conduct were unnecessary and dicta. The 4th Circuit has specifically rejected a negligence standard in assessing whether a union has breached its duty of fair representation. In *Buchanan v. N.L.R.B.,* 597 F.2d 388 (4th Cir., 1979) the court held that failure to process a meritorious grievance or negligence does not, per se, constitute arbitrary conduct.

Likewise, with the Sixth Circuit. The case cited by petitioner merely standards for the proposition that arbitrary or perfunctory conduct does not necessarily involve bad faith or fraud. It does not say that negligent or unintentional conduct can form the basis for finding a breach of the duty of fair representation. In fact, such conduct has been specifically declared to be insufficient to establish a breach of the duty. *Journeymen Pipe Fitters Local 392 v. NLRB,* 712 F.2d 225 (6th Cir., 1983). In this case

it was held the union did not breach its duty because there was no evidence presented to suggest that the union agent acted with hostility or with a discriminatory motive toward the member. This would imply the application of a standard of intentional misconduct.

The idea of mere negligent unintentional conduct being sufficient to breach the duty of fair representation was also ruled out by the Eighth Circuit in *Curtis v. United Transportation Union,* 700 F.2d 457 (8th Cir., 1983) when it held that mere negligence, poor judgment or ineptitude are insufficient to establish a breach of the duty. The proposition for which petitioner cites the case can be read to require intentional conduct. Terms such as "perfunctory", "without concen or solicitude" or "cursory" all can imply intentional conduct.

The Ninth Circuit case of *Dutrisac v. Caterpillar Tractor Co.,* 749 F.2d 1270 (9th Cir., 1983) holds that when the challenged conduct of the union is an erroneous decision regarding the merits of a grievance, or an interpretation of the contract, or the prosecution of the grievance at the arbitration hearing, then it is negligence which does *not* constitute a breach of the duty of fair representation. However, the court did hold that in cases where a union negligently fails to perform a ministerial act and where the individual interest is strong and the failure results in completely extinguishing the individual's right to preserve his claim, then such conduct may form the basis for imposing liability on the union for breach of its duty. It should be noted that the 9th Circuit previously held that conduct which shows egregious disregard for the rights of union members could violate the duty of fair representation [See *Tenario v. NLRB,* 680 F.2d 598 (9th

Pursuant to Rule 28.1, C. W. Transport, Inc. is a Delaware corporation and is a wholly owned subsidiary of Gerber Products Corporation, a Michigan corporation. No publicly held company owns ten percent or more of the stock of Gerber Products Corporation.

Cir., 1982)] and that negligence by itself could not breach the duty [*Robesky v. Quantas Empire Airways,* 573 F.2d 1082 (9th Cir., 1978)]. The concurring opinion in *Dutrisac* criticizes the majority opinion as signifying that ordinary negligence may constitute a breach of the union's duty of fair representation in spite of the explicit disclaimer to the contrary in *Robesky.* The law in the 9th Circuit does not seem to be settled.

Neither does *Faust v. IBEW,* 572 F.2d 710 (10th Cir., 1978) support the petitioner's contention of disagreement between the Circuits. There the question before the Court of Appeals was whether the trial court correctly instructed the jury as to the proper standards to apply. The court approved the trial court's submission of the *Vaca* standard and its definition of the terms "arbitrary", "capricious" and "bad faith", all of which, we believe, are just other ways of saying intentional misconduct. The evidence regarding the conduct found violative of the union's duty consisted mainly of the union's intentional insistence that the grievant personally submit the claim to them in spite of the short time available, the passing of correspondence between union officers in different states when time was short and the unexplained failure of the union to file the grievance, which it had, on time. This all implies conscious intentional conduct on the part of the union from which the jury could infer arbitrary, capricious and bad faith conduct.

The cases cited by the petitioner can stand for the proposition that some intentional conduct is required in order to find a beach of the union's duty of fair representation. Terms such as "arbitrary", "capricious" and "bad faith" have such connotations. The 9th Circuit is

the only one which has indicated that negligence, in certain limited cases, may be enough to breach the duty, and this case clearly is not one of those limited cases involving the failure to perform a ministerial act. This holding was criticized by the Dissent as being contrary to previously announced and unreversed holdings of the Court. We believe the differences in the Circuits are more of form than substance.

III.

The Court Of Appeals Did Not Err In Applying The Standard Of Intentional Misconduct To The Facts Of This Case.

The facts assumed by the District Court and quoted by petitioner is the very best case petitioner can establish. At the outset, it should be noted that the District Court did not say that petitioner had established the assumed facts, but had "arguably established" them. Petitioner claims that these facts "when viewed in light of respondent's motive to deprive Ehlenfeldt of his substantial pension benefits. . . ." created an issue of fact. The problem with that statement is that petitioner never adduced *any* evidence to support his bare theory of the respondents' motive. This alleged motive exists only in the mind of the petitioner and has absolutely no basis in fact. The courts below, after reviewing the transcripts, came to the same conclusion. The District Court observed:

> "This is not just a weak case. Under the facts brought to the Court's attention for this motion, it is an impossible case because there is *no* evidence from which intentional misconduct on the part of the union can be inferred." App. 16, Petition for Writ of Certiorari (Emphasis supplied).

The Court of Appeals also observed:

> "Thus, while he offers a bare theory of malicious discrimination against him, there is *not a shred of evidence* to support it." App. 5, Petition for Writ of Certiorari. (Emphasis supplied.)

On the evidence adduced in this case the lower courts had no option but to find as they did.

CONCLUSION

For the reasons stated above the Petition for Writ of Certiorari should not be granted.

Respectfully submitted,

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Dated at Wisconsin Rapids, Wisconsin
this 28th day of May, 1985.
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